

*In the Matter of Timothy O'Neil, Hillside*  
CSC Docket No. 2011-2942  
**(Civil Service Commission, decided February 8, 2012)**

Timothy O'Neil, a Police Officer with Hillside, represented by Craig S. Gumpel, Esq., appeals the discontinuation of his interim appointment to the title of Police Sergeant.

By way of background, the appellant's name appeared on the promotional list for Police Sergeant (PM2582H), Hillside, which was promulgated on February 15, 2007 and expired on June 2, 2010.<sup>1</sup> During the life of the list, two certifications were issued, and the eligibles ranked first through fourth were appointed in August 2007 and February 2008. The appellant ranked fifth on this list. Robert Hach, a Police Sergeant with Hillside, was removed on disciplinary charges, effective October 22, 2009. Hach filed a timely appeal of his removal with the Civil Service Commission (Commission), and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing on November 9, 2009. On January 1, 2010, while Hach's appeal was pending at the OAL, the appellant was assigned to work as an "Acting" Police Sergeant. According to the appellant, he began receiving the "pay and other emoluments of employment as a Sergeant" on or about January 19, 2010.

By letter dated May 28, 2010, the appellant previously petitioned the Commission for an immediate permanent appointment as a Police Sergeant, effective January 1, 2010. By letter dated June 29, 2010, staff of the Division of Merit System Practices and Labor Relations (MSPLR) advised that *N.J.A.C. 4A:4-1.6(b)3* provides that, when an appointing authority makes an appointment to a specific title in local service, an interim appointment shall be made where the position/title is held by a permanent employee who has been removed for disciplinary reasons and is awaiting final administrative action by the Commission on appeal. Thus, staff advised that the appellant's appointment should be recorded as an interim appointment, and he had demonstrated no entitlement to a permanent appointment as a Police Sergeant.

Subsequently, by letter dated December 30, 2010, Robert B. Quinlan, Police Chief, notified the appellant that he was being returned to his permanent title of Police Officer, effective January 4, 2011. Finally, at its meeting on January 11, 2012, the Commission acknowledged the withdrawal of Hach's appeal of his removal.

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<sup>1</sup> Although it was originally scheduled to expire on February 14, 2010, the subject eligible list was extended until the promulgation of a new eligible list. *See In the Matter of Promotional Lists for Public Safety Titles* (MSB, decided April 7, 2004). The Police Sergeant (PM2677L), Hillside, eligible list was promulgated on June 3, 2010.

In the instant request, the appellant argues that the Police Chief lacked the legal authority to unilaterally discontinue his interim appointment as a Police Sergeant. He contends that Hillside is a Mayor-Council form of government under the Faulkner Act. *See N.J.S.A. 40:69A-1, et seq.* As such, the appellant claims that the Police Chief only has the authority to remove employees with the consent of the Mayor. *See N.J.S.A. 40:69A-43(d)* (“Department heads shall appoint subordinate officers and employees within their respective departments and may, with approval of the mayor, remove such employees, subject to the provisions of Title 11A of the New Jersey Statutes.”) As such, the appellant maintains that the Police Chief could not remove him from his interim appointment as a Police Sergeant without the consent of the Mayor.<sup>2</sup>

In response, the appointing authority, represented by Richard H. Bauch, Esq., asserts that, when it initially gave the appellant an interim appointment to the title of Police Sergeant, he was the highest ranking eligible remaining on the Police Sergeant (PM2582H) eligible list. However, since he ranks 17<sup>th</sup> on the Police Sergeant (PM2677L) eligible list, which promulgated on June 3, 2010, it opted to discontinue his interim appointment in favor of the first ranked eligible on the current list, Qiana Brown. With regard to the appellant’s contentions regarding the Faulkner Act, the appointing authority first contends that the Commission lacks jurisdiction to entertain his arguments. In any event, the appointing authority argues that the appellant was not removed or demoted from a permanent position; thus, the Police Chief was authorized to discontinue the appellant’s interim appointment at his discretion. Moreover, the appointing authority avers that the discontinuation of an interim appointment is not an appealable issue. *See In the Matter of Richard Herrick*, Docket No. A-2590-06T1 (App. Div. July 28, 2008); *In the Matter of Katherine Bergmann* (MSB, decided March 27, 2002), *aff’d*, Docket No. A-5665-01T5 (App. Div. December 1, 2004).

In reply, the appellant points out that he was not removed from his interim position immediately upon promulgation of the Police Sergeant (PM2677L) eligible list; rather, his interim appointment was discontinued approximately seven months after the promulgation of that list. Additionally, the appellant maintains that the Commission has repeatedly exercised jurisdiction over similar Faulkner Act claims in *In the Matter of Town of Harrison Layoff* (CSC decided April 14, 2010). Finally, the appellant requests that the Police Sergeant (PM2582H) eligible list be revived in order that the appointing authority may properly effectuate his permanent appointment. The appellant asserts that Hach retired from his position, effective October 1, 2011.

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<sup>2</sup> The appellant also contends that, pursuant to *N.J.A.C. 4A:4-1.6(f)*, the appointing authority was *required* to continue his interim appointment pending the disposition of Hach’s appeal. However, since Hach’s appeal has since been disposed of, this claim has been rendered moot and will not be addressed herein.

## CONCLUSION

*N.J.A.C.* 4A:4-1.6(b) provides, *inter alia*, that an interim appointment shall be made where the position to be filled is held by a permanent employee who has been removed for disciplinary reasons and is awaiting a final administrative action following an appeal. *N.J.A.C.* 4A:4-1.6(h) provides that, if a complete eligible list exists for the title, the interim appointment shall be made from that list.

In accordance with the above regulatory provisions, this agency previously recorded the appellant's interim appointment to the title of Police Sergeant. In this regard, neither party disputed that the appellant had been assigned to perform the duties of a Police Sergeant on a continuous basis from January 1, 2010 until January 4, 2011, pending the disposition of Hach's appeal of his removal. In the instant matter, the appellant essentially contends that, once he received an interim appointment, he is entitled to a permanent appointment upon disposition of Hach's appeal, and that the Police Chief lacked the lawful authority to discontinue that appointment.

Initially, there is no provision in Civil Service law or rules which entitles an interim appointee to a permanent appointment at any time. Similarly, there is no provision of Civil Service law or rules that vests an interim appointee with any property interest in the title held on an interim basis. *See Herrick, supra; In the Matter of Leon Daniels* (CSC, decided December 3, 2008). Thus, as an interim appointee, the appellant had no vested interest in his continued interim appointment or any right to a permanent appointment at the end of the period of his interim appointment. In short, an interim appointment may be made and discontinued at the discretion of the appointing authority.

With regard to the Police Chief's authority to unilaterally discontinue the appellant's interim appointment, the Commission first notes that it has the right and duty to interpret and apply statutes, including those outside the Civil Service Act, to resolve the dispute before it. *See Matter of Allen*, 262 *N.J. Super.* 438, 444 (App. Div. 1993); *In the Matter of Edison Cerezo, Police Officer, West New York*, Docket No. A-4533-02T3 (App. Div. October 15, 2004); *John Kowaluk v. Township of Middletown*, Docket No. A-4866-02T1 (App. Div., August 6, 2004); *In the Matter of Michael Giannetta* (MSB, decided May 23, 2000). *Compare, In the Matter of Sybil Finney, Judiciary, Vicinage 8, Middlesex County* (MSB, decided March 24, 2004) (Merit System Board determined that it did not have jurisdiction to review a Judiciary employee's claim that the denial of a reasonable accommodation request violated the Americans with Disabilities Act (ADA), where the appeal was based *exclusively* upon an alleged ADA violation). Here, the question of the appellant's rights as an interim appointee are properly before the Commission. Thus, the Commission has jurisdiction to interpret other statutes, including the Faulkner Act,

in order to resolve the dispute before it. *See also, In the Matter of Town of Harrison Layoff, supra.*

As the appellant notes, *N.J.S.A.* 40:69A-43(d) provides that “[d]epartment heads shall appoint subordinate officers and employees within their respective departments and may, with approval of the mayor, remove such employees, subject to the provisions of Title 11A of the New Jersey Statutes.” The appellant contends that this statute supports his claim that the approval of the Mayor was required to discontinue his interim appointment. However, *N.J.S.A.* 40:69A-43(d) must be read in conjunction with Civil Service law and rules. In this regard, as noted above, an interim appointee enjoys no vested interest in a continued interim appointment or in a permanent appointment to the title occupied on an interim basis. In addition, *N.J.A.C.* 4A:1-1.3 defines “removal” as the “termination of a *permanent employee* from employment for disciplinary reasons.” Although the appellant is permanent in the title of Police Officer, he was serving an interim appointment as a Police Sergeant. Thus, the discontinuation of that appointment cannot fairly be characterized as a “removal” under Civil Service law and rules. Rather, the discontinuation of his interim appointment and the return to his title of Police Officer is properly characterized as the appellant’s return to his permanent title. As such, under the Faulkner Act, it does not appear that the consent of the Mayor is required.

Concerning the appellant’s request to revive the Police Sergeant (PM2582H) eligible list, *N.J.S.A.* 11A:4-6 provides that an eligible list may be revived in order to implement a court order or decision of the Commission in the event of a successful appeal instituted during the life of a list, to correct an administrative error, or for other good cause. *See also, N.J.A.C.* 4A:4-3.4. There is no court order or Commission decision requiring the revival of the eligible list, and the appellant has failed to present any evidence of an administrative error to justify a revival of that list. Thus, he would be required to demonstrate good cause in order to warrant revival of the expired eligible list. Since the appellant has failed to show that he possesses any entitlement to a permanent appointment, the Commission finds that good cause has not been demonstrated in the instant matter.

Finally, one additional issue warrants comment. The appointing authority notes in its response that, upon the discontinuation of the appellant’s interim appointment, it appointed Qiana Brown to serve as an “Acting” Police Sergeant. However, there is no record of this appointment in this agency’s records. The Commission has repeatedly held that there is no such designation as an “acting” appointment under Civil Service rules. *N.J.S.A.* 11A:4-13 and *N.J.A.C.* 4A:4-1 *et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. *See In the Matter of Russell Davis* (MSB, decided August 10, 2005); *In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). Thus, the Commission directs that the Division of State and Local Operations

record Brown's interim appointment to the title of Police Sergeant from January 4, 2011 until Hach's retirement on October 1, 2011. In this regard, it is settled that an interim appointment cannot continue beyond the date of Hach's retirement, since, at that time, the vacancy in the position became permanent. Therefore, the appointing authority is to immediately discontinue that interim appointment and either vacate the position currently occupied by Brown or request a certification from the Police Sergeant (PM2677L) eligible list from which it can make a permanent appointment to that position.

Accordingly, the appellant has failed to meet his burden of proof in this matter, and he is entitled to no relief.

### **ORDER**

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.